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ALEXANDER L. STEVAS

No. 82-415

IN THE

Supreme Court of The United States

October Term, 1982

JOHN N. ROBINSON,

Petitioner

v.

GEORGE J. MAGOVERN,
CARDIOTHORACIC SURGICAL ASSOCIATES, INC.,
AND ALLEGHENY GENERAL HOSPITAL,

Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit
at No. 81-2726

BRIEF FOR RESPONDENT GEORGE J. MAGOVERN IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent George J. Magovern respectfully prays that the petition for writ of certiorari be denied.

Questions Presented

1. Is there any special or important reason to grant certiorari?

2. Can there be an anti-trust violation in the absence of an injury to competition in a relevant geographic market?

3. Did documents held inadmissible by the trial judge have any probative value?

4. May a party discover the mental impressions, conclusions, opinions, or legal theories of an attorney?

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Statutes and Rules

Sherman Act, Section 1, 15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Sherman Act, Section 2, 15 U.S.C. §2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Rule of Civil Procedure 26(b)(3)

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the material in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation . . .

Statement of the Case

The complaint charges that Dr. George J. Magovern sought to exclude competition. Petitioner's statement omits the reasons why the trial judge found that this charge was completely incredible.

Dr. Magovern had no intent to monopolize (82a). One who has an intent to monopolize would not assist in the education of future competitors (82a). The record is full of the names of present competitors of Dr. Magovern who were trained by him (Tr. 4845) and of the time spent by him entirely without compensation in training many other surgeons and in publishing the results of research and operating experiences (Tr. 4840-4843). The training was of high quality, and Dr. Magovern thereby made notable contributions to medical science (10a). If Dr. Magovern wanted to monopolize, he would not spend 40% of his time (Tr. 4839-4840) in improving the skills of his competitors.

Dr. Magovern had a negative impression of petitioner after his interview (90a) because of petitioner's negative attitude toward the residence program at St. Francis Hospital, because he showed no interest in teaching and research, and because of his insulting remarks toward other surgeons which indicated that he would be a disruptive influence (32a). The reason for Dr. Magovern's adverse recommendation was this negative impression (90a) plus petitioner's attorney's letter threatening legal action against Dr. Magovern for failure to process an application which in fact had never been filed (34a, 90a). In addition, other surgeons gave adverse reports (33a, Allegheny Exhibits 9, 12; Tr. 854, 857).

Petitioner tells this Court that he studied under the famous Dr. Denton Cooley (p. 3), but neglects to mention that Dr. Cooley in a written evaluation made in 1972 found petitioner to be "somewhat paranoid", to show

"hostility", and to be a "generally resentful person" (Allegheny Ex. 9). Indeed, Dr. Cooley was "relieved that he completed his residence year without an explosion." In 1973 Dr. Cooley wrote that petitioner was "rather rigid and inflexible" and in 1976 that "he can be a rather stern, rigid person" (Joint Ex. 1-RR). And Dr. Cooley told Dr. Magovern that he had been afraid to write the hospital his real opinion of petitioner for fear that petitioner would shoot him (Tr. 5009). An inability to work harmoniously with other surgeons and hospital personnel seriously endangers patient care (130a).

Dr. Magovern was also rightly disturbed at petitioner's membership on so many other hospital staffs so that he could not remain at Allegheny General to devote to open-heart patients the large amount of additional time required during the critical hours following the operation (19a). Dr. Magovern and his associates consider it essential to stay in the hospital and in the operating room the full time to provide proper patient care by continued monitoring and to be available for a possibly required second operation (18a). At the very minimum, open-heart surgery requires the surgeon's attendance before the operation for an extra 45 minutes (Tr. 4866-4869), and after the operation for several hours (Tr. 4872-4873, 8079). But petitioner, who was on the staffs of seven other hospitals (50a) and has since joined seven more (Tr. 648), showed no inclination to devote the needed time to patients at Allegheny General (51a). Indeed, in his claim for damages which itemized what he planned to do with his time, petitioner intended to be available for patients at Allegheny only from the incision to the sewing-up and then to depart for other hospitals to make more money (Tr. 289, 315; Plaintiff's Ex. 109, p. 31).

Summary of Argument

Respondent Dr. George J. Magovern, director of surgery at Allegheny General Hospital in Pittsburgh, recommended against the admission to the staff of petitioner Dr. John N. Robinson. The complaint alleges that Dr. Magovern did this to suppress competition in violation of the anti-trust laws. In fact, as the trial judge found, Dr. Magovern had no such motive but devoted a great deal of his time to training, teaching, and improving the skills of his competitors. The adverse recommendation was based on petitioner's lack of interest in teaching and research, his hostile personality which would impair patient care, and his unwillingness to devote enough time to his patients.

The petition for certiorari seeks review only because the trial judge excluded from evidence a few letters which petitioner claims show a conspiracy between Dr. Magovern and the hospital. They do not show it, and were rightly excluded as communications between attorney and client. More crucial, the relevant geographic market found as a fact by the trial judge is sufficiently large that there can be no injury to competition. The share of Dr. Magovern and the hospital in the open-heart surgery involved in the geographical market is sufficiently small, and the opportunities for petitioner to practice open-heart surgery at three other very close hospitals are sufficiently great, that there can be no violation of the anti-trust laws.

ARGUMENT

I

There are no special or important reasons to grant certiorari.

Petitioner has not read Rule 17 of this Court. That Rule provides that certiorari "will be granted only when there are special and important reasons therefor" and goes on to "indicate the character of reasons that will be considered." Nothing in the petition even mentions any "special and important reasons" or attempts to meet the character of reasons covered by the Rule. This failure is enough reason to deny the petition.

II

There can be no anti-trust violation in the absence of an injury to competition in a relevant geographic market.

Not once in petitioner's argument does he mention the Sherman Act, a violation of which is essential to his case. Section 1 of the Act (p. iii) condemns a conspiracy in restraint of trade; Section 2 (p. iii) condemns monopolization. Petitioner's entire argument rests on the idea that the excluded documents would be evidence of a conspiracy. But even if that were so, petitioner has no case unless he can show that there was a conspiracy in restraint of trade or that the conspiracy would result in monopolization.

However, before there can be a restraint of trade or monopolization, there must be injury to competition in a relevant geographic market. As this Court held in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), before there can be a violation of the anti-trust laws (p. 327):

> "... the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market affected."

Petitioner has made no attempt in the Court of Appeals or in this Court even to mention the relevant geographic market, and is bound by the findings of fact of the trial judge. The relevant product was adult open heart surgery (57a), and petitioner's complaint was based on the fact that he was not admitted to the staff of Allegheny General Hospital (4a). But, within a few miles of that hospital, there were five other hospitals, fully equipped for adult open heart surgery (70a-71a), and petitioner was on the staff of three of these hospitals (121a). The trial judge found (71a):

> "The geographic proximity of all of the open heart hospitals means that most patients would not attach any significance to the relative locations of the hospitals. We cannot imagine that a referring physician would make a referral to one of the six hospitals on the basis of its location or that a patient would overrule his doctor's advice because he or she wanted to be a mile or two closer to home."

Allegheny General Hospital is on the north side of the Allegheny River; the other five are on the south (71a). Although there are 10 toll-free bridges over the river (158a), petitioner argued to the trial judge that the relevant geographic market consisted only of the portion of Allegheny County north of the river plus one adjoining county, thus excluding the five hospitals two miles away and including cow pastures 40 miles away (60a).

The reason given was that the bridges over the rivers were "barriers." If this gerrymandered market were genuine, then 55% of the open heart operations would have been performed at Allegheny (60a).

But the trial judge found that the other five hospitals were within the relevant geographic market, and in that market only 29.5% of the operations were performed at Allegheny (73a), while 22.1% were performed at Shadyside Hospital (521 F.Supp. at 887; petitioner's figure of 2.1% at 73a is a printer's error). Accordingly, the Court ruled (74a):

> "Based upon Allegheny General's 30% market share and the existence of at least five viable competitors, we hold that Allegheny General does not possess monopoly power over the delivery of adult open heart surgical services in the relevant geographic market."

And the Court concluded (98a):

> "With five other hospitals in Pittsburgh equipped to host open heart surgery, an effort by Dr. Magovern and Allegheny General to monopolize the delivery of adult open heart surgical services would be futile."

By these findings as to relevant geographic market the petitioner is bound.

We certainly deny emphatically that there was any conspiracy. But, even if the excluded documents were evidence of a conspiracy, they could not establish a violation of the anti-trust laws since there was no injury to competition in the relevant geographic market.

III

The excluded documents had no probative value.

Petitioner devotes much argument to the proposition that five excluded documents, out of the thousands he examined and 165 of which he put is evidence, besides 8,495 pages of testimony, were admissible. We doubt if this Court has the time to consider such matters, which are certainly not "special and important." The issue may simply be resolved by noting, contrary to petitioner's assertions (pp. 12-13), that the documents proved nothing. We need comment on these only briefly; page references are to the petition.

Letter No. 1 (p. 5) does not show, as petitioner says (p. 12), that defendants were planning how to withhold an application from petitioner; on the contrary, it shows that a form should be sent to petitioner and to his attorney. In addition, Dr. Magovern at the interview had told petitioner where to get a form (32a), but petitioner had not bothered (33a).

Letter No. 2 (p. 5), giving operating room statistics, was of no importance because a shortage of operating room space was only one of the seven reasons given by Dr. Magovern for his adverse recommendation (36a-37a). Even if Dr. Magovern had been mistaken on this point, the other reasons, discussed in our Statement of the Case, were more than sufficient.

Letters Nos. 3 and 4 (p. 5) simply show that the hospital officials agreed with Dr. Magovern. In the light of the facts in our Statement of the Case, and the unanimous vote of 13 disinterested physicians (45a) and the board of 26 trustees (54a), plus the trial judge and the full Court of Appeals (184a), such concurrence is not surprising.

Letter No. 5 (p. 6) does not show that Dr. Magovern "continued to exert pressure" (p. 13). Certainly Dr. Magovern, as Director of Surgery, had the right to tell his counsel that he thought that his recommendation was right and to prepare him for the expected litigation.

IV

A party is not entitled to discover the mental impressions, conclusions, opinions, or legal theories of an attorney.

Petitioner, arguing for admission of excluded documents, asserts (p. 16) that *Upjohn Co. v. United States*, 449 U.S. 383, 401-402 (1981), "bypassed" the question as to whether the work product rule applied in the case of a "far stronger showing of necessity and unavailability." Because of this, petitioner seeks discovery of the opinions of the hospital's attorney. Here petitioner is confusing the first and second sentences of Federal Rule of Civil Procedure 26(b)(3).

The first sentence of that Rule permits disclosure of things "prepared in anticipation of litigation" on a showing of "substantial need" and "undue hardship." So, the immunity of work product from discovery is not absolute and *Upjohn* simply ruled that under its facts there had not been this "showing."

But neither in the district court (170a) nor here do we rely on the work product rule for letters Nos. 1, 3 and 4, and so we need not prove an inadequate "showing." We are concerned only with the attorney-client privilege. The second sentence of Rule 26(b)(3) is clear

that even "when the required showing has been made", nevertheless there shall be no "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney." Petitioner says (p. 16):

> "Robinson submits that any standard, short of this total protection, compels disclosure."

Rule 26(b)(3) does not give total protection to some work product, but it does give total protection to the opinions of an attorney.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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